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UNITED STATES DISTRICT COURT
 DISTRICT OF ARIZONA

UNITED STATES OF AMERICA,)	CR 11-00126-5-PHX-JAT (LOA)
)	
Plaintiff,)	
)	UNITED STATES' <i>RESPONSE</i> TO THE
v.)	COURT' S ORDER REGARDING A
)	MOTION TO INTERVENE ON BEHALF
JAIME AVILA, et al.)	OF VICTIMS OF A CRIME TOGETHER
)	WITH A MEMORANDUM OF POINTS
Defendant.)	AND AUTHORITIES
)	
)	

The United States of America, by and through its counsel, Laura E. Duffy, United States Attorney, for the Southern District of California and Timothy D. Coughlin, Shane P. Harrigan and Mark Conover, Special Assistants to the Attorney General, hereby files its response to the Court's Order dated September 19, 2011.

I.

RESPONSE TO THE MOTION TO INTERVENE**A. The Southern District of California Assigned to the Case**

The United States responds to the motion and supporting briefing of Intervenors Kent Terry, Sr. and Josephine Terry (“Intervenors”) as follows. The brutal murder of Border Patrol Agent Brian Terry (“Agent Terry”) was a heinous and deplorable criminal act. The United States acknowledges that the family of Agent Terry has suffered and will continue to suffer greatly from the loss of their loved one, and will put forth its best efforts to see that justice is served. On September 7, 2011, the instant case, including the pending Motion to Intervene and Reply in Support of Motion to Intervene, was reassigned by the Department of Justice to the Southern District of California (“SDCA”). On the very day the case was reassigned, Laura E. Duffy, United States Attorney for the Southern District of California (“USA Duffy”), telephoned Paul K. Charlton (“Charlton”), counsel for the Intervenors, to introduce the team she assigned to prosecute this case, and inform Charlton of the measures SDCA would take to ensure the Intervenors would be able to participate in the proceeding involving Defendant Avila.

USA Duffy informed Charlton that the assigned prosecutors would be traveling to Phoenix that week to begin the transfer of the case, and become familiar with all aspects of the investigation and prosecution. In addition, USA Duffy instructed the Victim-Witness Coordinator for SDCA to obtain the contact information for Agent Terry’s parents, siblings and cousin and enter the family into the Victim Notification System (“VNS”) in order for the family to receive notice of case events and scheduled proceedings in this case, to include full access to VNS thereafter. As a follow-up to her conversation with Charlton, USA Duffy sent a letter

1 detailing what steps SDCA was taking to immediately afford the Terry family the opportunity
2 to receive information about the case, and to confer with the prosecutors – the very actions
3 requested by the Intervenors in the introductory paragraph of their motion.
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5 Shortly thereafter, the assigned prosecutors contacted Charlton and reiterated the
6 willingness of the prosecution team to extend those rights accorded by 18 U.S.C. § 3771, the
7 Crime Victims’ Rights Act (“CVRA”), within the control of the government to provide, to the
8 Terry family.
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10 **B. The Court’s Order**
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12 On September 19, 2011, this Court filed an Order directing the government to confer with
13 Terry family and their counsel by September 26, 2011 regarding the status of Motion to
14 Intervene. Further, the Court directed the government to file by September 30, 2011, its
15 response to following three issues raised by the Court:
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- 17 1) Whether the government still opposes intervention by the Terry family;
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19 2) If the government still opposes intervention, whether the government proposes and
20 alternative to intervention that would allow the Terry family to be extended rights as crime
21 victims under the CVRA; and,
22
23 3) Whether the government wishes to change any factual representations made in its
24 response to the Motion to Intervene.
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26 **B. The Government Withdraws It’s Motion Response**
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28 On September 26, 2011, government counsel contacted Charlton as the Terry Family’s
representative in order to confer with him about the pending and supplemental motions to

1 intervene in the Avila case. In an initial effort to reach a compromise the government stated it
2 was withdrawing it's August 8, 2011, motion response opposing the Terry Family's motion to
3 intervene. The government believes the crime victim issue is not ripe at this time, but that there
4 is an alternative approach that affords the Terry Family the CVRA rights they seek, without the
5 necessity of finding statutory victim status for them as a matter of law. Government counsel
6 explained to Charlton that having withdrawn it's previously filed motion response, it would fully
7 support the Terry Family's efforts to meaningfully participate in the proceedings in this case, and
8 advocate for the same with the Court. In addition, the government assured Charlton it would
9 provide the Terry Family with an opportunity to meet with the prosecutors handling the matter
10 and apprise the family of all future events related to the case.

14 Government counsel explained to Charlton that it is working on a protocol to identify and
15 address potential victims related to the case and this prosecution. The government has already
16 employed significant measures to extend those rights under the CVRA, within its ability, to the
17 family members of Agent Terry. In light of these steps government counsel believes that motion
18 to intervene is either moot or not ripe for review.

21 The government's research into the issue reveals that the CVRA affords eight
22 enumerated rights to a crime victim, defined as "a person directly and proximately harmed as
23 a result of the commission of a Federal offense," or if the person is deceased, the representatives
24 of the person's estate or the person's family members. *See* 18 U.S.C. § 3771 (a) and (e). The
25 requirement that the victim be "directly and proximately harmed" encompasses the traditional
26 "but for" and proximate cause analyses. *See In re Antrobus*, 519 F.3d 1123, 1126 (10th Cir.
27 2008); *United States v. Sharp*, 463 F. Supp. 2d 556, 567 (E.D. Va. 2006). The necessary inquiry
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1 is fact-specific. *In re Rendon Galvis*, 564 F.3d 170, 175 (2d Cir. 2009) citing *In re Antrobus*, 519
2 F. 3d 1123 (10th Cir. 2008).

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4 The facts of *Rendon Galvis* are similar to the instant case, and are therefore instructive.
5 Rendon's son, Juan Fernando Vargas Rendon ("Vargas"), was murdered in an area of Colombia
6 by paramilitaries affiliated with the Autodefensas Unidas de Colombia ("AUC"). Diego
7 Fernando Murillo-Bejarano ("Murillo-Bejarano"), an AUC leader, was extradited to the United
8 States, where he was charged with: (1) conspiracy to import into the United States, and to
9 distribute with the intent that it be imported, at least five kilograms of cocaine, in violation of
10 21 U.S.C. §§ 812, 952(a), 959(a), 960(b)(1)(B)(ii), and 963; and (2) conspiracy to commit money
11 laundering, in violation of 18 U.S.C. §§ 1956(a)(1)(B) and 1956(h). Murillo-Bejarano pleaded
12 guilty in the district court to the first count of the indictment, with the agreement that the
13 government would move to dismiss the second count at sentencing. Rendon filed a motion in the
14 district court seeking to enforce her rights as a crime victim under the CVRA in order to be
15 allowed to confer with the government, to be heard before sentencing, and to receive restitution.
16 She argued that Murillo-Bejarano's participation in the charged conspiracy was the actual and
17 proximate cause of her son's death because the AUC had targeted the area where her son was
18 killed for its importance as a drug-trafficking corridor, using disappearances and executions to
19 gain control of the area, and because the AUC had financed its terrorist activities with drug
20 proceeds. Rendon argued that the CVRA should be interpreted to include the victims of any acts
21 related to the charged conspiracy, to include the victims of acts of the defendant's co-
22 conspirators. Rendon claimed, similar to the Intervenor, that a broad interpretation of the
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1 definition of "crime victim" under the CVRA is consistent with its underlying legislative intent.
2 *Rendon Galvis* at 173.

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4 The district court found that Rendon was not a crime victim under the CVRA because the
5 harm to her son 'was not a direct and proximate result of conspiring to import cocaine into the
6 United States, which is the crime of conviction...' *Rendon Galvis* at 175. While the Court in
7 *Rendon Galvis* believed evidence suggested some type of link between Vargas's murder and the
8 drug conspiracy, the Court failed to find any clear error in the district court's conclusion that
9 Rendon ultimately failed to show the requisite causal connection between the harm suffered and
10 Murillo-Bejarano's participation in the drug conspiracy. *Id.* at 175-6.

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13 The *Rendon Galvis* case may be instructive should the Court be forced to make a decision
14 about the Terry Family's status as statutory victims of a crime as defined by the CVRA. In the
15 future, this Court may be required as a matter of law, to determine whether the harm, Brian
16 Terry's murder, is causally linked to the federal charges against Defendant Avila of conspiring
17 to deal in firearms without a license, for dealing in firearms without a license and for making
18 false statements in connection with the acquisition of firearms. 18 U.S.C. §§ 922(a)(1)(A),
19 924(a)(1)(A), to the degree required pursuant to the CVRA. And the Court may be called on to
20 decide whether an individual is only "directly and proximately harmed" under the CVRA when
21 the harm results from conduct underlying an element of the offense of conviction. *Sharp*, 463
22 F. Supp. 2d at 563. The Court in the future may have determine if there is sufficient evidence
23 to establish proximate harm, that is some "direct relationship" between the injury asserted and
24 the injurious conduct is necessary. See *Oki Semiconductor Co. v. Wells Fargo Bank*, 298 F.3d
25 768, 773 (9th Cir. 2002). The closer the relationship between the actions of the defendant and
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1 the injury sustained, the more likely that proximate harm exists. *Sharp* at 565. As the Court
2 knows, the offenses charged against Defendant Avila are regulatory offenses; the conduct
3 underlying any potential conviction would be the false representations Avila made in order to
4 secure the purchase of the firearms, and do not include the act of murder.
5

6 The government has, and will continue to the best of its ability provide those rights
7 conferred by the CVRA that are within its control to afford to the family members of Agent
8 Terry, to wit: the right to reasonable, accurate and timely notice of public court proceedings; the
9 reasonable right to confer with the attorney for the government in the case; and, the right to be
10 treated with fairness, and with respect for their dignity and privacy. Based on the Government's
11 actions to afford the Terry Family those rights it urges the Court to find the issue moot or the
12 alternative not ripe for judicial action.
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II
CONCLUSION

For the foregoing reasons, the United States respectfully requests: 1) the Court order the government's response to the Motion to intervene filed on August 8, 2011, be withdrawn; and, 2) the Court find motion to intervene as moot or the alternative not ripe based on the fact that the government has stated its willingness to extend to the Terry Family those rights accorded by 18 U.S.C. § 3771, the CVRA, within the control of the government.

DATED: September 30, 2011.

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 15, 2011

s/Timothy D. Coughlin
TIMOTHY D. COUGHLIN